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NO. 503

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

W. W. BOYD, JR., ET AL.

BRIEF IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI

THOMAS J. TUBB

RICHARD B. BOOTH

Attorneys For Appellee,

Bradley Lumber Company

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The Bradley Lumber Company, the purchaser at the foreclosure sale complained of, by and through its attorneys, Thomas J. Tubb and Richard B. Booth, respectfully pray that the petition filed by the United States of America for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit be denied.

REASONS FOR REFUSING THE WRIT

Paragraph (1) of Sub-Section (a) of Section 7424 of the Internal Revenue Code of 1954 specifically provides and recognizes that the holder of the prior lien may sell the property.

Section 7424 is as follows:

"Section 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) Obtaining Leave to File. -

(1) Request for institution of proceedings by United States. - Any person having a lien upon or any interest in the property referred to in section 7493, notice of which has been duly filed of record in the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, **or any person purchasing the property at a sale to satisfy such prior lien** or interest, **may** make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) Petition to court. - If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) Court order. - After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) Adjudication. - Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) Costs. - All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.

ITALICS SUPPLIED.

The proceedings in this case were instituted under the provisions of Section 7403 of the Internal Revenue Code of 1954 by the United States Government at a time when the foreclosure under the deed of trust which was admitted to be prior to the tax lien of the Government was already in the process of foreclosure. While it is true that the sale was actually had after the filing of the suit by the Government a prompt report was filed by the trustee setting out the facts of the sale and paying into Court the surplus funds derived therefrom. The Government in its pleadings never objected thereto and never amended the prayer of their petition to pray that the foreclosure be declared void. The record shows that the Government simply accepted this state of affairs and this was the state of the pleadings when the matter was presented to the District Court. The Government has complained that there is no record in the case and we have heretofore refrained from making this observation; however, if such be the case, we submit that the duty rested upon the Government to make a record and not upon the Bradley Lumber Company. The Bradley Lumber Company in its capacity as a named defendant to the proceedings in the District Court filed an answer setting out its materialman's lien but the District Court held that the materialman's lien of the Bradley Lumber Company was inferior not only to the lien of the Prudential Insurance Company as represented by its deed of trust but that such materialman's lien was also subsequent to and inferior to the lien of the United States Government for taxes. The Bradley Lumber Company took no appeal from the findings of the District Court. In its capacity as the purchaser at the foreclosure sale it was never summoned into Court and if it be concluded that its appearance in Court on the materialman's lien issue acts as an appearance for all purposes then upon the filing of the petition by the trustee showing the sale of the property under the terms of the deed of trust and further showing that the Bradley Lumber Company was the purchaser thereat we submit that thereupon and not later than the matter coming on for trial the Government was required to amend its pleadings and give notice thereof to the Bradley Lumber Company of an amended prayer to its original bill to void the foreclosure under

the terms of the deed of trust. This was not done. On the contrary, a careful reading of the pleadings at the time of the trial of the cause in the District Court would have to have been interpreted by the Bradley Lumber Company as an abandonment of so much of the Government's bill of complaint and prayer for relief as asks for a foreclosure order at the hands of the District Court and a continuance of its prosecution of so much of its suit as prayed for a judgment against the delinquent tax payer, W. W. Boyd, Jr. and wife, Annie T. Boyd and the other relief therein prayed for.

Stating the matter differently the utter failure of the Government to timely take issue with the answer of the trustee which reported the facts of the foreclosure and the payment into the Court of the surplus is sufficient alone to justify the denial of the petition herein. The Government's failure herein could only have been interpreted as an acquiesence by the Government in the sale. If this alone be not enough then when taken with the absence of a record in the lower Court most assuredly presents an inadequate state of affairs for the decision of so grave a matter as is said to be posed by the Government in its petition.

The Government, however, contends that under Section 7403 of the Internal Revenue Code of 1954 that the District Court has no choice but to order a foreclosure and with this contention we respectfully disagree. This flies squarely into the very wording of Sub-Section (c) of Section 7403 wherein it is provided that the Court "may" decree a sale of such property. There is nothing in this statute that required the Court in all events to order a foreclosure. On the contrary the Court is enjoined from ordering a foreclosure unless it is first established that the Government has a claim or interest in the property. The exact wording of the statute is that—"where a claim or interest of the United States therein is established, may decree a sale of such property: . . . ".

Sub-Section (c) of Section 7403 is as follows:

"(c) Adjudication and Decree. - The Court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States."

In its petition (page 9) the Government states that the Federal District Court substituted an equity of redemption and thereby substitutes its (the Court's) own views of an adequate remedy for those of Congress. In other words, the Government takes the position of complaining that the District Court gave it something that it already had in providing in its decree that the Government could redeem the property from the sale at any time within the twelve months thereafter. This complaint, we submit, is most unfair as the Court actually merely recognized the redemptive right that Section 2410 gives to the Government and which the District Court was powerless to deny and recognized in its decree.

CONCLUSION

We refrain from arguing the question of whether or not a Federal tax lien on real property may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure except to state that for the reasoning of the Government in its petition to be carried through its logical sequence it would be necessary to substitute the word "shall" for the word "may" in Sub-Section (c) of Section 7403 of the Internal Revenue Code of 1954 and thereby make it mandatory in all cases for the Court to decree a judicial sale of all Federal tax liens in every instance. We respectfully submit that the record and the pleadings in this case relied upon by the Court that heard the case and which were and are the sole responsibility of the Government are not such as would fairly present the question posed by the Government in its petition for a writ of certiorari.

We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Thomas J. Tubb
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BRADLEY LUMBER COMPANY,

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